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Supreme Court, U.S.
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No. 03-____

In the Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims for Title II of the Americans with Disabilities Act a valid exercise of its authority under section 5 of the Fourteenth Amendment?

2. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims for Section 504 of the Rehabilitation Act a valid exercise of its authority under section 5 of the Fourteenth Amendment?

3. The Court has stated clearly that State Eleventh Amendment immunity is constitutionally protected and that waivers of constitutionally protected rights must be knowing and voluntary. However, the Court also has noted that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, including, perhaps, waiving their Eleventh Amendment immunity. For Section 504 of the Rehabilitation Act, Congress expressly conditioned the States' acceptance of federal funds on the States' waiver of Eleventh Amendment immunity. For the conditioned waiver to be valid, must a State knowingly and voluntarily agree to waive its constitutionally protected sovereign immunity by its acceptance of federal funds or is it sufficient that Congress clearly express its intent to impose the waiver as a condition for receipt of federal funds?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, two Oregon correctional facilities, the Columbia River Correctional Institution and the Santiam Correctional Institution, respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Phiffer v. Columbia River Institute, et al.*, No. 01-35984 (April 21, 2003).[1]

OPINIONS BELOW

The district court's opinion and order was not reported and is attached to this petition. App. 1-13. The opinion of the Ninth Circuit Court of Appeals was not reported and is attached to this petition. App. 14-16.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' memorandum decision was dated and filed April 21, 2003. On July 15, 2003, Justice O'Connor granted petitioners an extension of time to file this petition for a writ of certiorari, to and including August 19, 2003. This petition is filed within the extension period granted by the Court.

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[1] Consistent with plaintiff's complaint, the Ninth Circuit Court of Appeals case title identifies the two state correctional facilities as being "institutes." In fact, however, they are "institutions." *See, e.g.*, Or. Admin. R. 291-139-0015(2)(b)(A) (regarding inmate legal assistants in the various correctional institutions, including Columbia River and Santiam); Or. Admin. R. 291-139-0025(2) (regarding law libraries at the Columbia River and Santiam Correctional Institutions).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts, and to provide for a common Defense and general welfare of the United States." United States Constitution art. I, § 8, cl. 1.

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title II of the Americans with Disabilities Act of 1990 provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II further provides:

- The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].

42 U.S.C. § 12133.

Congress purported to abrogate the States' Eleventh Amendment immunity under Title II as follows:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202

The Rehabilitation Act provides in part that:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *
>
> (b) For the purposes of this section, the term "program or activity" means all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> * * * * *
>
> any part of which is extended Federal financial assistance.

29 U.S.C. § 794. The act further provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

29 U.S.C. § 794a(2).

Congress purported to abrogate the States' Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a) as follows:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a

violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

Plaintiff is a resident of Texas.[2] From July to November 1997 and from April to December 1998, plaintiff was incarcerated in Oregon's Santiam Correctional Institution. From 1997 to April 1998, he was incarcerated in Oregon's Columbia River Correctional Institution. While at Columbia River, plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March through December 1998, during which time he was returned to the Santiam facility. Both the Transitional Mental Health Program and the Pathfinders Program are funded, in whole or in part, by the federal government.

Plaintiff claims that, during his incarceration, he suffered from osteoarthritis and osteoporosis. The Pathfinders Program met for three hours a day, five days per week. As a result of his disability, plaintiff was unable to sit for that period of time. He asked corrections officials at both the Santiam and Columbia River facilities to return him to the Transitional Mental Health Program or, alternatively, for a reasonable accommodation of his disabilities. The corrections officials denied his requests. As a result, he allegedly suffered severe physical pain while enrolled in the Pathfinders Program. Plaintiff contends that the state defendants could have made reasonable modifications to allow him to participate in a program that would have accommodated his disabilities, but that

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[2] This description of the facts is taken from plaintiff's complaint. Because the district court was ruling on the State's Motion for Judgment on the Pleadings, it accepted the plaintiff's allegations as true and drew all inferences in favor of the plaintiff. App. 3.

they failed to do so. He also alleged that the defendants were deliberately indifferent to the strong likelihood that their action or inaction was in violation of his federally protected rights.

In his complaint, plaintiff asserted three claims, one brought under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, one brought under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and one alleging a claim of negligence under the state Tort Claims Act, Or. Rev. Stat. § 30.265. In their amended answer, the state defendants relied, in part, on a claim of Eleventh Amendment immunity to plaintiff's Title II and Section 504 claims. Subsequently, the defendants filed a motion for judgment on the pleadings, relying on the claim of Eleventh Amendment immunity.

The district court denied the state defendants' motion. The district court held that, "as a matter of current law in th[e] circuit, * * * Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment." App. 12. The court noted the Ninth Circuit's holding that "Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was 'validly enacted under the Fourteenth Amendment.'" App. 12. The court also concluded, based on the Ninth Circuit's case law, that "Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate the[] [pertinent] state programs." App. 13. For that reason, the court denied defendants' motion for judgment on plaintiff's Section 504 claims. App. 13.

The state defendants appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (order denying motion to dismiss that is based on a claim of Eleventh Amendment immunity is subject to interlocutory appeal). On the merits of the state defendants' claim

to immunity from suit brought under Title II of the ADA, the Ninth Circuit Court of Appeals acknowledged the State's "valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), requires us to revisit our precedent[.]" App. 15. But the court noted that it had "already done so and ha[d] already rejected the State's claim." App. 15-16, citing *Hason v. Med. Bd. of Cal.,* 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), and *cert. dismissed* ___ U.S. ___, 2003 WL 1792116 (2003); *Thomas v. Nakatani,* 309 F.3d 1203, 1209 (9th Cir. 2002); and *Lovell v. Chandler,* 303 F.3d 1039, 1050–51 (9th Cir. 2002). The court "decline[d] further review of [its] settled precedent." App. 16.

With regard to the state defendants' claim to immunity from suit based on Section 504 of the Rehabilitation Act, the Ninth Circuit held that its "precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds." App. 16, citing *Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, 820, *as amended,* 271 F.3d 910 (9th Cir. 2001), *reh'g en banc denied,* 285 F.3d 1226 (9th Cir. 2002). The court rejected the state defendants' argument that intervening precedent from this Court, specifically *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 675–76 (1999), had "undermine[d]" the Ninth Circuit's "Eleventh Amendment waiver jurisprudence." App. 16. "Once again," the court noted, it had "already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds." App. 16, citing *Vinson v. Thomas,* 288 F.3d 1145, 1151 (9th Cir. 2002); *Lovell,* 303 F.3d at 1051. The Ninth Circuit thus affirmed the district court's decision and remanded. App. 16.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case because the circuits are split on each of the three questions presented. Moreover, each question raises significant issues concerning the States' sovereign immunity and the ability of Congress to abrogate or force a waiver of that immunity.

I. By granting certiorari in *Tennessee v. Lane* (02-1667), the Court agreed to resolve petitioners' question whether Congress validly abrogated the States' sovereign immunity for Title II of the ADA. This case may provide the Court the opportunity to more completely answer that important question.

As the Court is well aware, the circuits are deeply divided on the question whether Congress's attempt to abrogate the States' sovereign immunity for Title II of the ADA was a valid exercise of its authority under section 5 of the Fourteenth Amendment. In its petition for writ of certiorari in *Tennessee v. Lane* (02-1667), Tennessee thoroughly canvassed the four-way circuit split on this important issue. *Tennessee*, Pet. for Cert. 10-14. However, as Tennessee describes in its petition, despite granting certiorari three times to resolve this question, the opportunity for the Court to address the question has proved illusive. *Tennessee*, Pet. for Cert. 8-9. This case provides the Court with an additional opportunity to resolve the important question of the States' Eleventh Amendment immunity from private damage claims under Title II of the ADA.

In addition, this case may compliment the issue raised in *Tennessee* and give the Court a better opportunity to fully address the Title II immunity question. The claims at issue in *Tennessee* are based on alleged due process violations. The Sixth Circuit held that "the Eleventh Amendment barred claims under Title II of the Americans with Disabilities Act

based on equal protection violations but Congress could abrogate Eleventh Amendment immunity as to due process claims." *Tennessee*, 315 F.3d 682 (citing *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, ___ U.S. ___, 123 S.Ct. 72, 154 L.Ed.2d 15 (2002). Thus, the specific ruling at issue in *Tennessee* is whether Congress properly abrogated States' sovereign immunity for due process claims under Title II of the ADA.

The Court granted certiorari to address the broader of the two questions presented in the petition. *Tennessee v. Lane*, 123 S.Ct. 2622 (2003). The Court granted certiorari on the question "Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), exceeds Congress's authority under section 5 of the Fourteenth Amendment, thereby failing to abrogate the states' Eleventh Amendment immunity from private damage claims." The Court did not grant certiorari on the question "Whether the abrogation analysis under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns." *Tennessee v. Lane*, 02-1667, Pet. for Cert.

This case compliments the more narrow rulings of the Sixth Circuit in *Tennessee*. Together, the two cases give the Court the opportunity to fully resolve the question whether Congress properly abrogated States' sovereign immunity for all claims under Title II of the ADA.

II. The circuits are divided on the question whether Congress properly abrogated States' sovereign immunity for Section 504 of the Rehabilitation Act under section 5 of the Fourteenth Amendment.

The Court has clarified the limitations on Congress's authority to abrogate States' Eleventh Amendment immunity and established the type of review that courts must undertake when faced with challenges to that Congressional authority. The Court's most detailed statement of what review is required is found in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). The Court reiterated that "Congress may abrogate the State's Eleventh Amendment immunity [only] when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'" *Id.* at 363, quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). The Court "held that 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" *Garrett*, 531 U.S. at 364, quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

The Court then proceeded to demonstrate the proper manner of determining whether Congress validly exercised its authority under section 5 of the Fourteenth Amendment. The first step is "to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. "Once * * * the metes and bounds of the constitutional right in question" have been determined, the next task is to "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled." *Id.* at 368. That examination must focus on alleged discrimination *by the States*. *Id.* And it must be limited to instances of unconstitutional state discrimination. *Id.* Furthermore, "unexamined, anecdotal accounts of 'adverse, disparate

treatment by state officials'" do not suffice to establish the necessary pattern of unconstitutional State discrimination. *Id.* at 370. Even if the legislative history shows "a pattern of discrimination by the States which violates the Fourteenth Amendment," "the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 374.

Not all of the circuits have applied the *Garrett* type of analysis to the question of Congress's authority to abrogate the States' sovereign immunity for claims under Section 504 of the Rehabilitation Act and, perhaps as a result, the circuits have reached conflicting conclusions. Most circuits that have addressed the question have found the purported abrogation to exceed Congress's authority under section 5 of the Fourteenth Amendment. In a pre-*Garrett* case, the Ninth Circuit concluded to the contrary and upheld the abrogation as within Congress's authority. Following *Garrett*, the Ninth Circuit has refused to revisit its prior conclusion, creating a conflict between the circuits that have ruled on the issue.[3] Like the question of Congress's authority to abrogate the States' sovereign immunity for Title II of the ADA, the similar question for claims arising under Section 504 of the Rehabilitation Act is important and requires this Court's attention to resolve the conflict between the circuits.

The Second, Fifth, Seventh, Eighth and Tenth Circuits have concluded that Congress lacked the authority to abrogate the States' sovereign immunity for claims under Section 504 of the Rehabilitation Act. The Second Circuit held that Sec-

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[3] Other circuits have found it unnecessary to address this question, because they have concluded that the States waived any immunity they may have had by acceptance of federal funds, as discussed more fully in the next section.

tion 504, like Title II of the ADA, exceeds Congress's authority under section 5 of the Fourteenth Amendment for several reasons. *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001). Both provisions fail the requirement that remedies be congruent and proportional to the constitutional violations Congress sought to remedy or deter; both impermissibly shift the burden of proof onto the state to defend the absence of an accommodation that would be presumptively permissible under the Fourteenth Amendment; both require states to eradicate disparate effects divorced from any inquiry into intent. *Id.* at 109–110, 113. However, the court concluded that Title II could constitutionally apply to claims alleging violations motivated by discriminatory animus or ill will based on the plaintiff's disability, *Id.* at 111, and that Section 504 could constitutionally apply to claims alleging deliberate indifference to the rights secured the disabled by the act, *Id.* at 115.

The Fifth Circuit similarly held that Title II of the ADA exceeded Congress's authority for abrogating States' sovereign immunity and treated Section 504 the same in its analysis. *Reickenbacker v. Foster*, 274 F.3d 974, 977 n 17, 982–83 (5th Cir. 2001). For Section 504, the court concluded that Congress failed to identify a history and pattern of unconstitutional discrimination by the states against the disabled and imposed accommodation obligations on the States that exceed constitutional boundaries. *Id.* The court questioned the Second Circuit's shaping a judicially implied remedy in *Garcia* by permitting plaintiffs to proceed if they could establish violations motivated by discriminatory animus. *Id.* at 983–84 n. 72.

In *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000), the Seventh Circuit concluded with little analysis that Congress lacked the authority to abrogate the States' sovereign immu-

nity because the ADA rests on the Commerce Clause and the ADA and Rehabilitation Act are identical for purposes of § 5.

The Eighth Circuit reviewed the legislative history of Section 504 and found "little indication that Congress properly identified constitutional transgressions it sought to remedy by enacting § 504. In fact, the legislative history is largely silent regarding the reason § 504 was included in the [Rehabilitation Act]." *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745, 755 (8th Cir. 1999).[4] "Similarly, the legislative history of the abrogation provision does not identify constitutional transgressions that make such a provision appropriate. The legislative history of § 2000d–7 instead reveals only that Congress sought to override the Supreme Court's decision in *Atascadero* by providing an unequivocal expression of Congress's intent to abrogate the states' immunity." *Id.* at 756.

The Tenth Circuit reviewed the legislative record for both Title II of the ADA and Section 504 and found "some evidence * * * that unconstitutional discrimination against the disabled exists in government 'services, programs, or activities.'" *Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1077 (2002). However, the court concluded, "most of those occurrences involve local officials and not the states." *Id.* In addition, many of the examples did not rise to the level of unconstitutional discrimination. *Id.* at 1033–34. As a result of its review, the court concluded that Congress lacked the authority to abrogate the

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[4] The court initially ruled that there was no waiver of immunity because the conditions Congress placed on a State's receipt of federal funds were too broad and therefore coercive. *Bradley*, 189 F.3d at 758. The court reheard that portion of the decision en banc and vacated only that portion of the decision, leaving intact its ruling on the abrogation of sovereign immunity. *Jim C. v. U.S.*, 235 F.3d 1079, 1080 (8th Cir. 2000), *cert. denied sub nom Arkansas Dept. of Education v. Jim C.*, 544 U.S. 949 (2001).

States' sovereign immunity. *See also* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 89 n. 272 (2001) ("There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of the ADA Title I.").

The Ninth Circuit stands apart from the other circuits in its refusal to view *Garrett* as setting out the analysis courts must undertake to resolve questions of Congress's authority to abrogate States' sovereign immunity. Prior to *Garrett*, the Ninth Circuit rejected Eleventh Amendment immunity claims in both Title II and Section 504 cases. *Dare v. California*, 191 F.3d 1167, 1173–75 (9th Cir. 1999), *cert. denied* 531 U.S. 1190 (2001) (no Eleventh Amendment immunity as to Title II claim); *Clark v. State of California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998) (Eleventh Amendment does not bar Title II or Section 504 claims). In none of those cases did the Ninth Circuit undertake the kind of review this Court set out as a requirement in *Garrett*. Following *Garrett*, the Ninth Circuit simply adhered to its prior decisions and refused the States' argument that a more detailed review of the Eleventh Amendment immunity claims for Title II and Section 504 cases is required. See App 15-16 ("[A]lthough the States makes a valiant attempt to persuade us that * * * *Garrett* * * * requires us to revisit our precedent, we have already done so and have already rejected the State's claims. * * * We decline further review of our settled precedent."); see also, *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) (court refused to reexamine its prior holdings regarding the State's sovereign immunity for Title II and Section 504 claims).

It is important for this Court to resolve the split between the circuits on the Section 504 immunity issue for two reasons. First, there is no reason why States in the Ninth Circuit

should have less ability to exercise their sovereign immunity than States in the other circuits. Second, the Court should clarify its expectation that the Ninth Circuit should not disregard the Court's holdings that explain the analysis courts should undertake to resolve a certain type of issue.

III. Review is warranted to resolve the split between the circuits on the effect of Congress's purported waiver of State sovereign immunity for Section 504 claims under the Spending Clause power—a split that appears to be based on a conflict between two competing constitutional provisions.

The question whether a State retains its sovereign immunity for Section 504 claims after accepting federal funds brings two constitutional provisions into play—the Spending Clause and the Eleventh Amendment. The Court's statements about those two provisions appear to have led, at least in part, to the split between the circuits on this question. Those circuits that have treated the Rehabilitation Act as a condition imposed pursuant to Congress's Spending Clause authority have concluded that the waiver of immunity is a valid condition attached to receipt of federal funds. In contrast, those circuits that have viewed the issue under this Court's Eleventh Amendment sovereign immunity jurisprudence have asked whether the States could knowingly and voluntarily waive immunity if they did not have knowledge that they had immunity to waive. The Second and Fifth Circuits have concluded that the waiver could not be valid under that test.

Before describing the split among the circuits, it is important to discuss the Court's statements about Congress's spending power authority and about waiver of Eleventh Amendment immunity. Under the Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the States. "[O]bjectives not thought to be within Article I's 'enumerated legislative

fields,' * * * may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

The Court identified four limitations on the spending power. First, "[t]he exercise of the spending power must be in pursuit of 'the general welfare[,]'" but courts are to "defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207 (quoting *Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937). Second, if Congress intends to place a condition on the States' receipt of federal funds, it "must do so unambiguously * * *, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds," but "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 208, 209 (citations omitted).

In addition to these limitations, Congress may not "induce the States to engage in activities that would themselves be unconstitutional" and "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 210, 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

As discussed below, some circuits have viewed the waiver of Eleventh Amendment immunity for Section 504 claims as

a condition Congress placed on the receipt of federal funds under its spending power authority. These circuits have concluded that the condition satisfies the Court's limitations on the spending power. In contrast to these decisions upholding the waiver as simply a condition on the receipt of federal funds, other circuits have focused on the Court's statements regarding Eleventh Amendment immunity in *College Sav. Bank v. Fla. Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999), leading to a very different analysis of the waiver of immunity for Section 504 claims and a different result.

In *College Savings Bank*, the Court reiterated that, although a State may waive its sovereign immunity, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" 527 U.S. at 675 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985)). A State's waiver of immunity must be express and unequivocal and the Court rejected the idea of a constructive waiver of immunity.

> The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. * * * There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

College Savings Bank, 527 U.S. at 680–81, quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis in original).

The Court noted that sovereign immunity is constitutionally protected and that waivers of constitutional rights are effective only if the waiver is a knowing and voluntary one.

> The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937). *See also Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern* [*Life Ins. Co. v. Read*], *supra*, [322 U.S. 47,] at 51 [(1944)]; *Pennhurst* [*State School and Hospital v. Halderman*], 465 U.S. [89], at 98 [(1984)]. And in the context of *federal* sovereign immunity—obviously the closest analogy to the present case—it is well established that waivers are not implied. See, *e.g.*, *United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

College Savings Bank, 527 U.S. at 682 (emphasis in original).

The Court recognized that:

> a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Fla. v. Florida*, 517 U.S. 44 (1996)]. Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin.

College Savings Bank, 527 U.S. at 683.

Although the Court in *College Savings Bank* appears to have dictated the type of analysis followed by the Second and Fifth Circuits (considering whether States could waive a right to immunity that they did not know existed), it did not resolve the issue presented in this case. The Court left open the door for the analysis followed by the Ninth and other circuits, which have viewed the waiver simply as a condition imposed pursuant to Congress's spending power:

> [W]e have held in such cases as *South Dakota v. Dole*, 483 U.S. 203 (1987) that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. These cases seem to us fundamentally different from the present one. * * * Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to

> its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. * * * [W]e think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

College Savings Bank, 527 U.S. at 686–87.

This case presents the issue that the Court left open in *College Savings Bank* and that appears to have resulted in the split between the circuits: when Congress conditions the acceptance of federal funds on the State's waiver of sovereign immunity, is that action reviewed as a condition under Congress's spending power or as the waiver of a constitutional right which must be knowing, voluntary and unequivocal? The answer to that question appears to have dictated the conclusion reached by the various circuits as they have struggled to resolve the issue.

The Ninth Circuit viewed the waiver in the Rehabilitation Act simply as an exercise of Congress's spending power.

> One way for a state to waive its immunity is to accept federal funds where the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."

Clark, 123 F.3d at 1271. Because Congress made its intent clear, the Ninth Circuit concluded that the waiver requirement

was valid. *Id.*[5] In a dissent to the court's denial of a suggestion for rehearing en banc on this issue in *Douglas v. California Dept. of Youth Authority*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J., dissenting), Judge O'Scannlain identified this tension between the Spending Clause analysis and the Eleventh Amendment analysis as a critical issue the Ninth Circuit (and other courts) had failed to address:

> Courts must decide whether a State retains its sovereign immunity after accepting conditioned federal funds are caught between two competing lines of jurisprudence. Under the Supreme Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the states. * * * Yet, under the Supreme Court's Eleventh Amendment sovereign immunity jurisprudence, Congress's ability to place affirmative obligations on the States using its Fourteenth Amendment enforcement power is rapidly diminishing. * * * Each doctrine pulls us in an opposite direction.

Id. at 1226 (footnote omitted). Judge O'Scannlain identified the two doctrines as, first, the requirement that a State's waiver of its sovereign immunity must be made clearly and voluntarily, with a stringent test for finding a waiver, and second, the countervailing doctrine that Congress may "condition its grant of funds to the States, even by requiring States to take actions that Congress could not directly require them to

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[5] The Ninth Circuit, in this case, simply reiterated its prior holding from *Clark* that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. App. 16.

take, such as waiving their sovereign immunity." *Id.* at 1228–29, relying on *College Savings Bank* for both propositions.

The Eighth Circuit relied on a similar analysis as the Ninth Circuit majority in upholding the waiver provision for Section 504 claims. *Jim C. v. U.S.*, 235 F.3d 1079 (8th Cir. 2000). Although the court cited *College Savings Bank*, it did so only for the proposition that "Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly." *Id.* at 1081. Instead, it relied on the Court's language in *Dole* that "Congress may attach conditions on the receipt of federal funds." *Jim C.*, 235 F.3d at 1081 (quoting *Dole*, 483 U.S. at 206).

> To avoid the effect of Section 504 on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities. * * * In these cases, the Court has found no coercive interference with state sovereignty because the State could follow the "'simple expedient' of not yielding." * * * The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.

Id. at 1081–82. The court considered only whether the waiver provides a clear expression of Congress's intent to condition participation in the program on a State's consent to waive its

constitutional immunity and found that it met that requirement. *Id.* at 1082.

The dissent in *Jim C.* found the financial inducement offered by Congress for the State's waiver of its sovereign immunity coercive and challenged the majority's decision as permitting Congress to "achieve indirectly what it cannot constitutionally achieve directly" by an abrogation of the State's immunity. *Id.* at 1082–83 (Bowman, J., dissenting). The dissent concluded that the condition imposed with respect to Rehabilitation Act claims "bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education," *Id.* at 1084, and therefore exceeds what Congress may permissibly exact in exchange for federal funds.

The Third Circuit upheld the waiver, looking only at whether Congress, in amending the Rehabilitation Act, made it clear that accepting federal funds results in a waiver of Eleventh Amendment immunity. *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 170 (3rd Cir. 2002) *cert. denied sub nom Pennsylvania Dept. of Corrections v. Koslow*, ___ U.S. ___, 123 S.Ct. 1353, 155 L. Ed. 2d 196 (2003). While noting that "[a] state's waiver of sovereign immunity is not lightly granted" and "[m]ere participation in a federal program is not sufficient to waive immunity," the court nevertheless concluded that "where a state participates in a federal financial assistance program 'in light of the existing state of the law,' the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity." *Id.* at 172 (quoting *Edelman v. Jordan*, 415 U.S. 651, 687 (1974)). The court also rejected the State's argument that the waiver provision constituted an unconstitutional condition, requiring a surrender of constitutionally protected rights, relying in part on *College Savings Bank* for the proposition that this Court allowed "Congress to condition the exer-

cise of an Article I power on a state's agreement to relinquish Eleventh Amendment immunity." *Id.* at 173.

The Tenth Circuit similarly concluded that because Congress clearly stated its intent that States would waive their immunity by receipt of federal funds, the waiver satisfied the requirement of "an unequivocal indication that the State intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment." *Robinson v. Kansas*, 295 F.3d 1183, 1189–90 (10th Cir. 2002), *cert. denied sub nom Kansas v. Robinson*, ___ U.S. ___, 123 S.Ct. 2574 (2003) (quoting *Atascadero*, 473 U.S. at 238 n. 1).

The Eleventh Circuit reached the same conclusion in a case dealing with claims under Title VI of the Civil Rights Act of 1964, which are based on a parallel statement of waiver in 42 U.S.C. § 2000d-7 as the waiver for the Section 504 claims. *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *reversed on other grounds Alexander v. Sandoval*, 532 U.S. 275 (2001). The court focused only on the language used by Congress and found that the "provision's plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." *Id.* at 493. The court relied on this Court's statements in *College Savings Bank* "reaffirm[ing] the constitutionality of conditioning federal funds upon the waiver of state sovereign immunity." *Id.* at 494.[6]

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[6] The Seventh Circuit, relying in part on *Sandoval* stated that "the Rehabilitation Act also is a condition on the receipt of federal funds, and legislation under the spending power is not affected by *Kimel*." *Stanley*, 213 F.3d at 344. The court provided little analysis in support of its conclusion that "the Rehabilitation Act is enforceable in federal court against recipients of federal largess." *Id.* Similarly, the Sixth Circuit, relying in part on *Stanley*, concluded that Congress's validly conditioned the States' acceptance of federal funds on a waiver of sovereign immunity because the language in

In contrast to the circuits upholding the waiver provision as a valid exercise of Congress's spending power, other circuits have focused on this Court's strong language in *College Savings Bank* that State sovereign immunity is a constitutional right that, like other constitutional rights, can only be waived if the waiver is knowing and voluntary. The Second Circuit relied on *College Savings Bank* in reaching its conclusion that the waiver imposed on the receipt of federal funds under Section 504 of the Rehabilitation Act can be valid only if the state "has made a knowing and intentional waiver[.]" *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 114 (2nd Cir. 2001).

> [W]e are unable to conclude that New York in fact waived its sovereign immunity against suit under § 504 when it accepted federal funds for SUNY. At the time that New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority. Indeed, the ADA expressly provided that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation...." 42 U.S.C. § 12202. Since, as we have noted, the proscriptions of Title II and § 504 are virtually identical, *a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, College Sav-*

Section 2000d-7 so clearly expressed Congress's intent to impose the condition. *Nihiser v. Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), *cert. denied sub nom Ohio E.P.A. v. Nihiser*, 536 U.S. 922 (2002).

> *ings Bank*, 527 U.S. at 682, *since by all reasonable appearances state sovereign immunity had already been lost*[.]

Garcia, 280 F.3d at 114 (emphasis added, citation and footnote omitted).

The Second Circuit criticized the decisions of its sister circuits as:

> unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682.

Garcia, 280 F.3d at 115 n. 5.

The Fifth Circuit took a similar approach to its analysis of the question. Although it recognized that Congress enacted the conditional waiver provision pursuant to its spending power, it, too, required that the State's waiver be knowing and voluntary. *Pace v. Bogalusa City School Board*, 325 F.3d 609, 615-16, rehearing en banc allowed, ___ F.3d ___, 2003 WL 21692677 (5th Cir. 2003).

> Prior to *Reickenbacker* [*v. Foster*, 274 F.3d 974 (5th Cir. 2001)], the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA. Believing that the acts validly abrogated their sovereign immunity, the

> State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds. * * * The Louisiana defendants' actions were voluntary, but they did not manifest a *knowing* waiver of that which they could not know they had the power to waive.

Pace, 325 F.3d at 616 (emphasis in original, footnotes omitted).

In *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691 (5th Cir. 2003), the court clarified its view of the relationship between the analysis of conditions imposed under Congress's spending power and waivers of sovereign immunity. It identified "two inquiries" it must make "in determining whether a state has waived its sovereign immunity by accepting federal funds." *Id.* at 694. The first is whether Congress manifested a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity. *Id.* The second is whether the state knowingly and voluntarily intended to waive its immunity by accepting the funds. *Id.* Although the court acknowledged that "the two inquiries overlap in most cases," it treats a condition requiring waiver of a state's sovereign immunity differently than other conditions by requiring the waiver to be of a known right and indulging every reasonable presumption against a finding of a waiver. *Id.*

> What looks like a hard but plain choice in retrospect—accept funds and thereby waive sovereign immunity—at the time was in fact an easy and carefree choice for Tech—accept funds without consequence, because § 2000d-7 appeared already to have abrogated Tech's immunity. Tech's "actions were voluntary, but [it] did not manifest a knowing waiver of that

> which [it] could not know [it] had the power to waive." [*Pace*,] at 616–17. To hold otherwise and impute to Tech a degree of omniscience would undermine the "central purpose" of the doctrine of state sovereign immunity: "to 'accord the States the respect owed them as' joint sovereigns." [*Fed. Maritime Comm'n v.*]*S.C. State Ports Auth.*, 535 U.S. [743,] 765 [(2002)] (quoting *Puerto Rico Aqueduct & Sewer Auth.* [*v. Metcalf & Eddy, Inc.*], 506 U.S. [139,] 146 [(1993)]).

Miller, 330 F.3d at 695 (footnote omitted).

Thus, the majority of circuits have focused solely on this Court's statements regarding the authority of Congress to place conditions on the receipt of federal funds under its spending power. That approach gives too little regard for the constitutional basis of State sovereign immunity and this Court's equally clear statement that the unequivocal expression of Congress's intent cannot serve as the State's unequivocal expression that it is waiving its sovereign immunity. States may have been put on notice by the language in section 2000d-7 of the Rehabilitation Act, but they cannot be said to have knowingly and voluntarily waived their constitutional right to sovereign immunity. This case presents the Court with the opportunity to clarify an important question that divides the federal circuits.

CONCLUSION

For the reasons discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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August 19, 2003

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BILLY RAY PHIFFER,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon public entity, and DEPARTMENT OF CORRECTIONS SANTIAM CORRECTIONAL INSTITUTION, a State of Oregon public entity,

Defendants.

CV 00-1652-BR

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Judgment on the Pleadings (#14) as to Plaintiff's First and Second Claims. Plaintiff brought this action alleging Defendants failed to reasonably accommodate his disabilities while he was incarcerated. Plaintiff asserts three claims in his Complaint:

First – Unlawful Discrimination on the Basis of Disability in Violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132;

Second – Unlawful Discrimination on the Basis of Disability in Violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and

Third – Negligence under the Oregon Tort Claims Act (OTCA), Or. Rev. Stat. § 30.265.

Plaintiff seeks injunctive relief, damages, attorneys' fees, and costs. For the purpose of deciding Defendants' Motion, the Court will assume it has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), and 1367(a).

For the reasons that follow, Defendants' Motion for Judgment on the Pleadings is **DENIED**.

RELEVANT FACTUAL BACKGROUND[1]

Plaintiff is a resident of Texas who formerly was incarcerated in Oregon. From July 1997 to November 1997 and from April 1998 to December 1998, Plaintiff was incarcerated at the Santiam Correctional Institution (SCI). From November 1997 to April 1998, Plaintiff was incarcerated at the Columbia River Correctional Institution (CRCI).

While at CRCI, Plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March 1998 through December 1998, during which time he was returned to SCI. Both the Transitional Mental Health Program and the Pathfinders Program are funded by the federal government.

During his incarceration, Plaintiff suffered from osteoarthritis and osteoporosis. He was unable to sit for the three-hour period, five times a week, required to participate in the Pathfinders Program. Plaintiff requested Defendants to return him to the Transitional Mental Health Program or, alternatively, to reasonably accommodate him for his disabilities. Defendants denied his requests. As a result, Plaintiff suffered severe physical pain while he was enrolled in the Pathfinders Program. Plaintiff contends Defendants were deliberately indifferent to the strong likelihood that their action and/or inaction violated Plaintiff's federally-protected rights.

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[1] This factual summary is taken from Plaintiff's Complaint. For the purpose of Defendants' Motion, the Court has accepted Plaintiff's allegations as true and has drawn all inferences in favor of Plaintiff, the nonmoving party.

STANDARDS

Pursuant to Fed. R. Civ. P. 12(c), any party may move for judgment on the pleadings after the pleadings are closed. For purposes of such a motion, the court accepts the nonmoving party's allegations as true and views all inferences in a light most favorable to the nonmoving party. *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1998) (citations omitted). A judgment on the pleadings is properly granted when, taking all allegations in the nonmoving party's pleadings as true, the moving party is entitled to judgment as a matter of law. *See McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997) (citation omitted). *See also Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999).

DISCUSSION

Defendants seek dismissal of Plaintiff's First and Second Claims. In support of their Motion, Defendants contend they are immune from private actions brought under Title II of the ADA and Section 504 of the Rehabilitation Act pursuant to the Eleventh Amendment because they are state government entities. Defendants acknowledge the United States Congress intended to abolish state immunity when Congress enacted the ADA and Section 504; nevertheless, Defendants argue the states are immune under the Eleventh Amendment because Congress exceeded its constitutional authority when it enacted those portions of the Acts.

A. Plaintiff's First Claim under Title II of the ADA

Plaintiff asserts in his First Claim that Defendants violated Title II of the ADA when they failed to reasonably accommodate him for his disabilities and compelled him to participate in the Pathfinders Program. Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA defines "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B).

Defendants base their arguments on a recent decision by the United States Supreme Court in which the Court ruled Congress did not validly abrogate the states' sovereign immunity from actions brought in federal court by private claimants for money damages under Title I of the ADA.[2] *See Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 121 S. Ct. 955, 967-68 (2001). The Court held, therefore, actions brought in federal court by state employees to recover money damages for a state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *Id.* Defendants maintain their Motion should be granted because the

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[2] Title I of the ADA addresses discrimination in employment and provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Court's rationale in *Garrett* applies equally to both of Plaintiff's claims.

Plaintiff counters Defendants' Motion should be denied. Plaintiff relies on *Pennsylvania Dept. of Corrections v. Yeskey* in which the Supreme Court held Title II of the ADA applies to state prisons. 524 U.S. 206, 209-10 (1998). Plaintiff argues the *Garrett* decision did not change the relevant, analytical framework for determining whether Congress validly nullified the states' Eleventh Amendment immunity from actions brought in federal court. Plaintiff also points out before and after *Garrett*, the Ninth Circuit held Congress validly abrogated state prisons' sovereign immunity from claims brought in federal court under Title II of the ADA and Section 504 of the Rehabilitation Act.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment also precludes citizens from bringing actions in federal court against their own states. *Garrett*, 121 S. Ct. at 962 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.") (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). Nevertheless, pursuant to its enforcement powers in § 5 of the Fourteenth Amendment, Congress is authorized to abrogate the states' Eleventh Amendment immunity when Congress (1) unequivocally expresses an intent to do so, and (2) acts pursuant

to a valid grant of constitutional authority. *Id. See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

There is no dispute Congress unequivocally expressed its intent to abrogate the states' immunity from liability for statutory violations when Title II of the ADA was enacted. 42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State Court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Relying on *Garrett*, however, Defendants maintain Congress acted outside the permissible scope of its constitutional power when it abrogated the states' sovereign immunity for violations of Title II of the ADA. In § 5, the Fourteenth Amendment grants Congress the power to enforce "by appropriate legislation" the substantive guarantees set forth in § 1.[3] *See*

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[3] Section One of the Fourteenth Amendment provides:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Garrett, 121 S. Ct. at 963 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

In *Garrett*, the Court concluded Title I of the ADA, which pertains to public employment, was not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. *Id.* at 968. The Court noted a state is not required to make special accommodations for the disabled if the state's conduct satisfies the minimum "rational-basis" review that courts apply to general social and economic legislation. *Id.* at 963-64. After an examination of the relevant legislative history, the Court determined Congress did not make a finding of "a pattern of irrational state discrimination in employment against the disabled." *Id.* at 965. Moreover, the Court found the rights and remedies created by Title I of the ADA were not congruent and proportional to any relevant constitutional violations identified by Congress. *Id.* at 966-68.

Defendants argue the Supreme Court's analysis applied to Title I in *Garrett* also applies to Title II. Defendants further assert this Court is bound to follow the Supreme Court's reasoning in *Garrett* and, therefore, must find Defendants immune from liability under Title II. Plaintiff argues the Court did not address Title II in *Garrett*; and, therefore, this Court must follow Ninth Circuit precedent set out in the cases discussed below in which the appellate court established Title II of the ADA is a valid exercise of Congress's constitutional power. The Court agrees with Plaintiff and rejects Defendants' arguments.

Before *Garrett*, the Supreme Court held Title II of the ADA "plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." *Pennsylvania v. Yeskey,* 524 U.S. at 209 (emphasis in original). Without addressing the constitutional issues raised by Defendants in the case before this Court, the Supreme Court reasoned, "The text of [Title II of] the ADA provides no basis for dis-

tinguishing [state prison] programs, services, and activities from those provided by public entities that are not prisons." *Id.* at 210.

In *Garrett*, however, the Court expressly declined to "decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment." 121 S. Ct. at 960 n.1, 966 n.7. The Supreme Court has not determined after *Garrett* whether Title II of the ADA is constitutional; therefore, only Ninth Circuit decisions on that issue bind this Court. The Ninth Circuit has consistently ruled Title II of the ADA is a valid exercise of Congress's power under § 5.

For instance, in *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), the plaintiffs were state inmates who sought injunctive relief under Title II of the ADA on the grounds they were discriminated against due to their developmental disabilities. The Ninth Circuit applied the two-part test set forth in *Seminole Tribe*, found Title II of the ADA to be a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, and affirmed the district court's decision that the State of California was not immune from liability pursuant to the Eleventh Amendment. *Id.* at 1269-70.

In *Dare v. California*, the Ninth Circuit also held Title II of the ADA is "a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated [the State of California's] Eleventh Amendment immunity." 191 F.3d 1167, 1175 (9th Cir 1999), *cert. denied*, 121 S. Ct. 1187 (2001). The court noted Congress "made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face." *Id.* (citing 42 U.S.C. § 12101(a)). The court reasoned, therefore, "[W]e will not second-guess Con-

gress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Id.* (internal quotations and citation omitted). After *Garrett*, without addressing constitutional issues, the court ruled Title II of the ADA "applies to state prisons." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citing *Yeskey*, 524 U.S. at 209).

Plaintiff also cites and relies on *Wroncy v. Oregon Department of Transportation,* No. 00-35356, 2001 WL 474550, at *1-2 (9th Cir. Apr. 9, 2001), a Ninth Circuit unpublished, post-*Garrett* decision. Plaintiff contends the Ninth Circuit affirmed *Clark* and *Dare* in *Wroncy*. Plaintiff further contends the Ninth Circuit did not reconsider its pre-*Garrett* decision because the Supreme Court expressly declined to reach the constitutionality of Title II in *Garrett*. Defendants point out *Wroncy* might have supported Plaintiff's position if it were a published opinion, but unpublished decisions of the Ninth Circuit are neither persuasive nor controlling authority. *See* 9th Cir. Rule 36-3. *See also Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001). Accordingly, this Court will not consider *Wroncy* or any other unpublished decision cited by Plaintiff.

In a post-*Garrett* decision, the Ninth Circuit held a claim against a California Senate Committee under Title V of the ADA was barred by the Eleventh Amendment. *See Demshki v. Monteith,* 255 F.3d 986, 988-89 (9th cir. 2001). Title V prohibits discrimination against any individual who opposes an "act or practice made unlawful" by the substantive provisions of the ADA. 42 U.S.C. § 12203(a). In *Demshki*, a former employee alleged he was unlawfully discharged for expressing concern over the Senate Committee's possible violation of relevant law pertaining to disabled job applicants. *Id.* at 987. The Ninth Circuit reasoned:

> We recognize that *Garrett* arose in the context of Title I, but we nevertheless conclude that the Court's holding necessarily applies to claims brought under Title V of the ADA, at least where, as here, the claims are predicated on alleged violations of Title I.

Id. at 988. The Ninth Circuit did not discuss or criticize its prior holdings in *Clark* or *Dare* nor did it address the constitutionality of Title II of the ADA. The *Demshki* decision, therefore, does not alter existing precedent in which the Ninth Circuit has held Title II of the ADA to be a valid exercise of Congress's power. *See Dare*, 191 F.3d at 1174-75. *See also Clark*, 123 F.3d at 1270.

District courts cannot ignore controlling case authority even if it "appears to rest on reasons rejected in some other line of cases." *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (circuit courts of appeal must follow precedential decisions by the United States Supreme Court), *petition for cert. filed*, 69 U.S.L.W. 3763, 70 U.S.L.W. 3035-36 (U.S. May 21, 200) (Nos. 00-1772, 00-1741, and 00-1754) (internal quotations and citations omitted). *See also Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). This Court must follow Ninth Circuit precedent. *See Yong v. Immigration and Naturalization Service (INS)*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it . . . ."). *See also United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir.) (directly binding decisions must be followed, leaving to the higher court "the prerogative of overruling its own case decisions."), *cert. denied*, 121 S. Ct. 1503 (2001) (internal quotations and citation omitted). Accordingly, this Court finds Plaintiff's First Claim is not defi-

cient as a matter of current law in this circuit, and Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment.

B. Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act.

The parties agree the Court must evaluate a claim brought under Section 504 of the Rehabilitation Act by applying the same two-part test used to determine whether Congress properly abrogated state sovereign immunity when it enacted Title II of the ADA. Defendants concede Section 504 satisfies the first element because Congress clearly and unequivocally expressed its intention to abolish state immunity under the Eleventh Amendment. The Rehabilitation Act provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). *See also Clark*, 123 F.3d at 1269 ("Congress has unequivocally expressed its intent to abrogate the State's immunity under . . . the Rehabilitation Act.").

The Ninth Circuit evaluated whether Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was "validly enacted under the Fourteenth Amendment." *Id.* at 1270. The Ninth Circuit reasoned, "Congress explicitly found that persons with disabilities have suffered discrimination", and "section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled." *Id.*

In *Clark*, the Ninth Circuit also held a state's acceptance of Rehabilitation Act funds creates an express waiver of the state's immunity under the Eleventh Amendment in a discrimination action under Section 504 of the Rehabilitation Act. *Id.* at 1271.

Plaintiff alleges in his Complaint the Transitional Mental Health Program and the Pathfinders Program were wholly or partially funded through federal financial assistance. Viewing Plaintiff's allegations as true at this stage of the proceedings, the Court concludes Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate these state programs. Accordingly, Defendants' Motion to Dismiss Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act is denied.

CONCLUSION

Based on the foregoing, Defendants' Motion for Judgment on

the Pleadings (#14) is **DENIED**.

IT IS SO ORDERED.

Dated this 17th day of September, 2001.

/s/ Anna J. Brown
ANNA J. BROWN
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY RAY PHIFFER, an individual,

Plaintiff-Appellee,

v.

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Defendants-Appellants.

No. 01-35984

D.C. No. CV-01-01652-AJB

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted March 6, 2003**
Portland, Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges

The State appeals the district court's denial of its motion for judgment on the pleadings based on Eleventh Amendment sovereign immunity. The facts and prior proceedings are known to the parties, and are restated herein only as necessary.

The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. *See Clark v. California,* 123 F.3d 1267, 1269 (9th Cir. 1997) ("This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment." (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993))). The Respondent contends, however, that we must look at each case to determine whether the appeal involves a "serious and unsettled question of law." We disagree. We have never required such a showing for an interlocutory appeal of Eleventh Amendment immunity, *see, e.g., Thomas v. Nakatani*, 309 F.3d 1203, 1206-07 (9th Cir. 2002), nor has the Supreme Court, *see, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993), and we decline to require such a showing at this time. Accordingly, we have jurisdiction over the State's appeal.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *See, e.g., Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark*, 123 F.3d at 1270. And, although the State makes a valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), requires us to revisit our precedent, we have already done so and have already rejected the State's claims. *See Hason v. Med. Bd. of*

Cal., 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), *and cert. dismissed* 2003 WL 1792116 (U.S. April 7, 2003) (No. 02-479); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002) (stating that *Hason* reaffirmed *Clark*'s and *Dare*'s holding that Congress abrogated sovereign immunity under Title II); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002) (same). We decline further review of our settled precedent.

Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. *See, e.g., Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 820, *as amended*, 271 F.3d 910 (9th Cir. 2001), *and reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002). Again, the State points to "intervening Supreme Court precedent," this time *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999), which it contends undermines our Eleventh Amendment waiver jurisprudence. Once again, we have already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds. *Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002) (reaffirming *Douglas*'s holding that by accepting federal funds, a state waives its sovereign immunity); *Lovell*, 303 F.3d at 1051 (same). We find the State's claims without merit.

AFFIRMED and REMANDED.